United Nations A/CN.9/SR.874

General Assembly

Distr.: General
5 August 2008

Original: English

United Nations Commission on International Trade Law

Forty-first session

Summary record of the 874th meeting
Held at Headquarters, New York, on Friday, 20 June 2008, at 3 p.m.

Chairperson: Mr. Illescas ..... (Spain)

Contents

Election of officers (*continued*)

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of this document* to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

08-39374 (E)

The meeting was called to order at 3.20 p.m.

Election of officers (*continued*)

1. **Mr. Bigot** (Observer for Côte d'Ivoire), speaking on behalf of the African States, nominated Mr. Amadou Kane Diallo (Senegal) for the office of Vice-Chairperson.

2. **Mr. Mbiah** (Observer for Ghana), **Mr. Elsayed** (Egypt), on behalf of the Arab States, **Ms. Wakarima Karigithu** (Kenya), **Mr. Egbadon** (Nigeria), **Ms. Downing** (Australia), **Mr. Moulopo** (Observer for the Congo), **Mr. Miller** (United States of America), **Mr. Berlingieri** (Italy), **Mr. Lebedev** (Russian Federation), **Mr. Delebecque** (France), **Mr. Blake-Lawson** (United Kingdom), **Ms. Talbot** (Observer for New Zealand), **Mr. Sato** (Japan), **Mr. van der Ziel** (Observer for the Netherlands), **Mr. Ousseimi** (Observer for the Niger), **Mr. Kim** In Hyeon (Republic of Korea), **Ms. Czerwenka** (Germany), **Mr. Hu** Zhengliang (China), **Mr. Mollmann** (Observer for Denmark), **Mr. Imorou** (Benin), **Mr. Sharma** (India), **Mr. Luvambano** (Observer for Angola), **Mr. Schelin** (Observer for Sweden), **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo), **Mr. Tsantzalos** (Greece), **Ms. Mbeng** (Cameroon), **Ms. Halde** (Canada), **Mr. Nzibe** (Gabon), **Ms. Slettemoen** (Norway) and **Ms. Traoré** (Observer for Burkina Faso) endorsed the nomination.

3. *Mr. Amadou Kane Diallo (Senegal) was elected Vice-Chairperson by acclamation.*

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

Draft article 59 (When a negotiable transport document or negotiable electronic transport record is issued)

4. **Mr. Blake-Lawson** (United Kingdom) said that his delegation had considerable concerns about chapter 11 on transfer of rights. The current draft text lacked sufficient detail to achieve either certainty or the harmonization of national law. In addition, it should not be subject to the same conditions of applicability as the remainder of the draft convention. The chapter needed to be further clarified and modified to be of benefit to future shippers, consignees and carriers. The whole chapter should therefore be removed and worked on further.

5. As an example, draft article 59 did not address when and under which circumstances a negotiable transport document might become exhausted as a document of title or when and under which circumstances the right to possession of the goods might therefore cease to attach to the document. Nor did it address the effect of transferring the document once that stage had been reached. It was also unsatisfactory that transfer rights under straight bills of lading were not covered. It would make more sense to provide that the rights to delivery of the goods were transferred by transfer of the document from the shipper to the consignee, rather than to leave the matter to national law. His delegation also had concerns in respect of draft article 60 but would reserve its comments until the discussions on draft article 59 had been completed.

6. **Ms. Downing** (Australia), drawing attention to her delegation's written comments (A/CN.9/658, para. 55) and expressing support for the concerns raised by the representative of the United Kingdom, said that her delegation's concerns in respect of draft articles 59 and 60 stemmed from the fact that they were narrower in scope than current national law and couched in vague language.

7. **The Chairperson** said that, in the absence of any other comments, he took it that the Commission wished to approve draft article 59.

8. *Draft article 59 was approved in substance and referred to the drafting group.*

Draft article 60 (Liability of holder)

9. **Mr. Kim** In Hyeon (Republic of Korea) wondered whether it might be appropriate to replace the phrase "exercise(s) any right" in paragraphs 1, 2 and 3 by the phrase "demand(s) delivery of the goods", by analogy with the change made to draft article 45.

10. **Mr. Mollmann** (Observer for Denmark) said that the reference to article 45 in paragraph 3 was no longer necessary and could, therefore, simply be deleted.

11. **Ms. Downing** (Australia), drawing attention to her delegation's written comments (A/CN.9/658, paras. 53-55), said that the Australian banking industry had pointed out that negotiable transport documents were often consigned to a bank without prior notice or

agreement. Under draft article 60, paragraph 2, the bank, acting as the consignee, might incur liabilities for contractual commitments, costs and so on. In the banking industry's view, such an approach was inconsistent with general principles and would create problems in the area of cost-recovery.

12. **Mr. Sato** (Japan) said that while draft article 60 would undoubtedly work well in some countries, it would create major difficulties for others, including Japan. In the worst case scenario, it could even prevent some countries from ratifying the convention. The Commission should therefore consider deleting if not the entire draft article then at least paragraph 2.

13. **Mr. Miller** (United States of America), **Mr. Mayer** (Switzerland), **Mr. Hu** Zhengliang (China) and **Mr. Sharma** (India) expressed support for the Danish proposal to delete the reference to article 45 in paragraph 3.

14. **Mr. Mayer** (Switzerland) also expressed support for the Japanese proposal to delete paragraph 2.

15. **Mr. Blake-Lawson** (United Kingdom) said that draft article 60 in its entirety should be deleted.

16. **Mr. van der Ziel** (Observer for the Netherlands) expressed support for the Danish proposal, but said that the rest of the draft article should be retained in its current form. Draft article 60 was of benefit to holders and banks. Under paragraph 1, a bank that took no action assumed no liability. He failed, therefore, to understand the Australian banking industry's concerns. Paragraph 2, meanwhile, simply reflected a general rule in respect of documents of title and confirmed that the rule applied to bills of lading, too.

17. **Mr. Berlingieri** (Italy) endorsed the proposals of both the Republic of Korea and Denmark. However, if, as the Republic of Korea proposed, the phrase "exercise(s) any right" was replaced by "demand(s) delivery of the goods" in paragraphs 1 and 2, paragraph 3 would no longer serve a purpose and could therefore be deleted in its entirety.

18. **Mr. Elsayed** (Egypt) expressed support for the Italian position.

19. **The Chairperson** said that if there was no objection, he would take it that the Commission wished to make the technical amendments proposed by the delegations of the Republic of Korea and Denmark.

20. **Mr. Mollmann** (Observer for Denmark) said that he would prefer to leave paragraphs 1 and 2 unchanged and simply to delete the reference to draft article 45.

21. **Mr. van der Ziel** (Netherlands), supported by **Mr.** Ibrahima Khalil **Diallo** (Senegal), objected to the Chairperson's statement that the amendment proposed by the representative of the Republic of Korea was of a purely technical nature. In the context of draft article 45, the consignee's exercise of its rights related solely to delivery of the goods; draft article 60, however, related not only to the consignee but to any holder and to the entire period of carriage. If the proposed amendment to paragraph 1 were made, a bank that exercised the right of control — as it might be forced to do if it held a pledge — might also have to assume any liability; the reference to draft article 57 had been included precisely in order to address that situation. In any event, he did not think that the Commission wished to dilute the meaning of paragraphs 1 and 2 by replacing "exercise(s) any right" by "demand(s) delivery of the goods".

22. He would prefer to leave paragraphs 1 and 2 in their current form; however, if the proposed changes were made, the representative of Italy was correct in stating that paragraph 3 would no longer be needed; the reference to article 57 in paragraph 1 could also be deleted.

23. **Mr. Miller** (United States of America) said that he agreed with the observer for the Netherlands; his delegation would prefer simply to delete the reference to draft article 45 as the Danish delegation had proposed.

24. **Mr. Berlingieri** (Italy) said he had thought that there was general agreement on the representative of the Republic of Korea's proposal. He agreed that the proposed amendments to paragraphs 1 and 2 would make paragraph 3 unnecessary; conversely, if that paragraph was retained, the proposed changes in paragraphs 1 and 2 should not be made.

25. **Mr. Sharma** (India) said that, while he supported the Danish delegation's proposal to delete the reference to draft article 45, he was not in favour of the amendments proposed by the delegation of the Republic of Korea. As the observer for the Netherlands had noted, draft articles 45 and 60 referred to different situations; in the latter case, the holder could be the controlling party, in which case its rights would not be restricted to the period of delivery.

26. **Mr. Kim** In Hyeon (Republic of Korea) said that he had not meant to make a formal proposal but had merely posed a question. After hearing the explanation given by the representative of the Netherlands, he thought that it would be sufficient to delete the reference to draft article 45 from paragraph 3.

27. **The Chairperson** said, he took it that the Commission wished to delete the reference to draft article 45 from paragraph 3.

28. *Draft article 60, as amended, was approved in substance and referred to the drafting group.*

Draft article 61 (Limits of liability)

29. **Ms. Hu** Shengtao (China) said that her Government attached great importance to the draft convention and would like to make it a workable legal instrument. However, China's shipping industry was of the view that the limits of liability established in the Hague-Visby Rules should be maintained. Her delegation had tried to demonstrate flexibility during the lengthy negotiations on draft article 61, but if the limits of liability were set higher than those in the Hamburg Rules, China would be unable to sign the draft convention.

30. **Mr. Delebecque** (France) said that his delegation fully supported the current text of the draft article, which represented an advance over the existing versions.

31. **Mr**. Ibrahima Khalil **Diallo** (Senegal) said that most of the African States were governed by legislation that was over a century old. They had made many concessions during the negotiations on the draft convention, yet the level of protection that it afforded shippers was still below that of the Hamburg Rules. While the text of draft article 61 was not perfect, it was part of a compromise package regarding the limitation on the carrier's liability (A/CN.9/WG.III/XXI/CRP.5) that had been negotiated during the twenty-first session of Working Group III (Transport Law), and the limits agreed at that time were reasonable. His delegation strongly supported the provision in its current form.

32. **Mr. Mbiah** (Observer for Ghana) said that, while the text of the draft convention was not set in stone, it represented a delicate balance that could not be changed without renegotiating a number of provisions of great concern to developing economies such as his own. The draft article should remain unchanged.

33. **Mr. Tsantzalos** (Greece), drawing attention to his delegation's written comments (A/C.9/658/Add.10, paras. 5-8), said that during the Working Group's deliberations, his delegation had expressed the view that liability limits should not be increased from the levels established in the Hague-Visby Rules, which were adequate to handle the vast majority of claims, as a counterbalance to the shift in the allocation of risk and liability towards the carrier in the draft convention. His delegation had been willing to take a positive approach to the initial compromise proposal for the adoption of maximum limits in line with those of the Hamburg Rules, combined with the deletion of other controversial provisions, as an overall package. However, it could not support the new proposal represented by draft article 61, which provided for limits even higher than under the Hamburg Rules. Another solution should be sought.

34. **Mr. Mollmann** (Observer for Denmark), speaking on behalf of **Ms. Slettenmoen** (Norway), who could not be present, said that the Norwegian delegation had endorsed the compromise package agreed in the Working Group and could not support any alternative proposals.

35. **Ms. Carlson** (United States of America) said that, although her delegation was not fully satisfied with the limits of liability established in the draft article, other delegations had shown flexibility on issues of great importance to the United States as part of the compromise package. She recognized that China's adherence to the draft convention, once adopted, would be vital to its success, but her own delegation supported the draft article in its current form.

36. **Mr. Elsayed** (Egypt) said that his delegation advocated leaving the text as it stood with one slight amendment in the second sentence of paragraph 3: instead of referring to the value of the currency "at the date of judgement or award", it would be fairer to make the value date the date that suit was filed or that arbitration proceedings were brought. There could be a considerable change in the value of a currency between the bringing of a claim and the pronouncement of a judgement or award, and the earlier date was closer to the date of the damage or loss.

37. **Mr. Schelin** (Observer for Sweden) said that the most important goal was to ensure that the greatest possible number of States could find the draft

convention satisfactory as a whole, so that it would be ratified by States representing a large percentage of world trade and transport in all regions. Only if its provisions represented a fair balance between the carrier's and the shipper's interests was there hope that the convention would come to form the global standard in maritime trade. The debate had shown that a number of delegations found some of the more important draft articles unsatisfactory, including those applying to land transport and those on the carrier's limits of liability, particularly the limitation amounts. His delegation believed that it was not too late to reach a compromise on those issues. Although he was well aware that the current provisions were the result of many years of negotiation and represented a delicate balance, it was possible that only minimal changes might make a broader consensus possible. His delegation wished to go on record as being willing to work out such a compromise together with other delegations.

38. With regard specifically to draft article 61, paragraph 1, Sweden proposed replacing the phrase "the carrier's liability for breaches of its obligations" with "the carrier's liability for loss resulting from loss of or damage to the goods as well as for loss resulting from misdelivery of the goods". Loss or damage to the goods and misdelivery represented the typical situations for which the carrier was liable and narrowed somewhat the scope of the carrier's obligations covered by the limitation amounts. Liability for loss from misinformation, for example, would not be limited. Considering that the shipper had no opportunity to limit its liability for misinformation, that struck a fairer balance.

39. **Mr. Hu** In Hyeon (Republic of Korea) recalled that in the Working Group his delegation had argued that the limits provided for under the Hague-Visby Rules, which the Republic of Korea had incorporated the previous year into its maritime law, were the appropriate ones. After lengthy consultations with industry, it had decided to maintain that position. Most of the East Asian countries were satisfied with the Hague-Visby limits. Even the shippers' associations did not feel the need for liability limits higher than those under the Hamburg Rules. Recent developments in packing had made it possible to increase the number of packages in a container; by declaring the full number of packages and paying a higher freight, a shipper could receive full compensation for loss. The draft convention's elimination of nautical fault as one of the carrier's defences would increase insurance premiums for the carrier in any case; Korean carriers were unwilling to accept higher liability limits as well. His delegation therefore continued to advocate the use of the Hague-Visby limits in draft article 61.

40. **Mr. Sandoval** (Chile) said that his delegation considered the limits set out in draft article 61, which were slightly higher than those under the Hamburg Rules, to be acceptable. Indeed, it would have wished the limits to be set even higher but had accepted the compromise in the hopes that it would enable the convention to bring about a unification of international transport law. He would urge delegations to support the current text.

41. **Mr. Berlingieri** (Italy) said that, since his delegation had participated in negotiating the limits of liability, it was committed to them.

42. **Ms. Peer** (Austria) said that her delegation supported the current limits of liability but was in favour of adopting the proposal of Sweden.

43. **Ms. Wakarima Karigithu** (Kenya) said that her delegation was strongly in favour of retaining draft article 61 in its current wording for the reasons expressed in particular by France, Ghana, Senegal and the United States of America.

The meeting was suspended at 4.40 p.m. and resumed at 5.05 p.m.

44. **Mr. Mollmann** (Observer for Denmark) said that as one of the sponsors of the compromise his delegation was saddened to hear that the limitation amounts were a cause of great concern to some delegations, including China and the Republic of Korea. The compromise had been agreed upon as a package, and it was important not to reopen single issues. What the delegation of Sweden had proposed as a minor adjustment was in fact a major change that would have a large impact on the draft convention.

45. **Mr. Egbadon** (Nigeria) stressed that the current text was the result of a complex compromise; the issue of limits could not be reopened without reopening all the other issues tied to the package. All regions of the globe should be taken into consideration, and many developing countries felt that the limits in draft article 61 should be retained. With regard to the Swedish proposal, his delegation was not in favour of redefining the carrier's breaches of obligation, since the current wording had also been part of the compromise.

46. **Ms. Czerwenka** (Germany) said that, despite arguments that the issue should not be reopened, it was the Commission's task to consider all aspects of the draft convention. She, too, was eager for the convention to enter into force throughout the world; it would be unfortunate if some regions were left out. Her delegation was willing to look into the question of limits and perhaps, without reopening all aspects, to help devise a package in which all concerns were reflected.

47. Her delegation also shared Sweden's concerns about the scope of the obligations of the carrier covered by the limits of liability and therefore supported the proposed change of wording. Many delegations had been concerned that a reference merely to loss and damage would be too narrow, and the current formula had therefore been devised, but the carrier's failure to supply information or indeed to provide the means of transport altogether had never been intended to be covered by the liability limits. A reference to misdelivery as well as loss and damage would clarify what had originally been intended by "breaches of its obligations"; the Swedish proposal therefore constituted a clarification, not a change of substance.

48. **Mr. Lebedev** (Russian Federation) said draft articles 18 and 61 were undoubtedly crucial to the draft convention. Leading experts in maritime law had been working on the draft for six years and some kind of output was essential. Of course, the convention, once adopted, would be heavily scrutinized. At that point there would be three international conventions in existence governing maritime trade, and it was not clear which of the three would be most widely applied.

49. While it would be difficult to go back and reconsider the liability limitation amounts, the Commission might reconsider the use of the phrase "breaches of its obligations under this Convention", a term not found in the Hague Rules or the Hamburg Rules, instead of the traditional "loss or damage to the goods". Paragraph 189 of the report of Working Group III (Transport Law) on the work of its twenty-first session (A/CN.9/645) indicated that there had been uncertainty about whether misinformation and misdelivery were or should be included. The term "breaches of its obligations" was vague and unclear, and guidelines would be required for courts and arbitration tribunals in applying the provision. If it were possible to revert to the original notion of loss or damage to the goods, it might be easier to reach consensus on the monetary amounts of liability.

50. **Mr Sharma** (India) said that the Working Group, after much effort, had produced a compromise text that struck a balance between those who wanted higher limits of liability and those who wanted lower limits. Consequently, although he was sympathetic to the concerns of China and the Republic of Korea, his delegation had accepted the compromise, in fact had proposed the current limits, and could not reverse its position. The Swedish proposal had merit. His delegation could not take a definitive position on it, since its hands were tied by the original agreement.

51. **Ms. Halde** (Canada) said that, not having been a party to the compromise agreement, her delegation would support Sweden's efforts to build a broader consensus. It also supported the proposed change to paragraph 1 for that reason.

52. **Mr. Sato** (Japan) said that his delegation had not been a sponsor of the compromise package in the Working Group, since it considered the limits too high, but it had ultimately supported the compromise. He was not optimistic about the emergence of any broader consensus on a new package, but would endorse such a consensus. If that effort failed, his delegation would stand by the current text of the draft article. Also, with regard to the Swedish proposal, the text of article 61 had been kept intentionally ambiguous. By specifically mentioning loss, damage and misdelivery, the Swedish proposal would, furthermore, affect the interpretation of article 18, making it clear that it did not cover misdelivery. That point, too, had been deliberately left ambiguous, because in some jurisdictions misdelivery was considered loss of the goods.

53. **Mr. Moulopo** (Observer for the Congo) said that article 61 was the result of a comprehensive compromise no part of which was subject to reconsideration. He therefore supported the text as it stood.

54. **Mr. Bigot** (Observer for Côte d'Ivoire) said that article 61 represented a single package reconciling divergent opinions on a number of issues, not just the limits of liability. Although his own delegation would have liked higher limits, support for the compromise text sent a strong signal of support for the principle of universality. His delegation was committed to the current text of draft article 61.

55. **Mr. Morán Bovio** (Spain) said that his delegation found draft article 61 fully acceptable in its current form. It had been an enormous task to reach consensus, and an agreement of that sort could not be improved upon.

56. **Ms. Mbeng** (Cameroon) said that her delegation had advocated higher limits but had agreed to the current text of draft article 61 in a spirit of compromise. The Swedish proposal represented a substantial change. Her delegation considered itself bound by the firm agreement that no aspect of the compromise package regarding the limitation on the carrier's liability would reopened.

57. **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo), noting that some advances were historic and that the Commission had a chance to adopt the draft convention as a universal instrument, said that draft article 61 should be approved in its current form without reservation.

58. **Mr. Serrano Martínez** (Colombia) said that, even though his own country's law allowed higher limits of liability, his delegation supported the current text of draft article 61.

59. **Mr. Madariaga** (Honduras) said that one of the basic aims of the Commission was the harmonization of law. It had been agreed that the draft text would not be touched, and that commitment should be respected now.

60. **Mr. Luvambano** (Observer for Angola) said that the word "compromise" had an important legal definition. The text should be retained as drafted.

61. **Mr. Oyarzábal** (Observer for Argentina) said that the limits set in draft article 61 were 10 times lower than those his Government would have wanted, and it therefore could not accept any further reduction.

62. **Mr. Blake-Lawson** (United Kingdom), **Mr. Imorou** (Benin), **Ms. Lost-Sieminska** (Poland), **Mr. Ndzibe** (Gabon), **Mr. Hron** (Czech Republic), **Mr. Ousseimi** (Observer for the Niger) and **Ms. Traoré** (Observer for Burkina Faso) said that their delegations supported the compromise and wished to retain the current wording of draft article 61.

63. **Mr. Hu** Zhengliang (China) said, to clear up any misunderstanding of why his Government could not accept the limits of liability set in draft article 61, that the decision had been reached carefully, after consultation with China's cargo and shipping industries, which had unanimously maintained that, while the Hague-Visby Rules were acceptable, the limits set under the Hamburg Rules were higher than commercially necessary for the foreseeable future, and that to go above even the Hamburg Rules would harm maritime trade.

64. In the Working Group, China, as a political concession, had accepted the limits under the Hamburg Rules as the absolute maximum, but had never been given an explanation of why it was necessary to go any higher. The Commission, in going beyond what was necessary, had not been faithful to its principle of adopting rules of law that facilitated trade. The Commission's major political consideration should be to encourage the widest application of the convention to maritime trade, in terms of both trade volume and the number of contracting States. In World Trade Organization statistics, China ranked third in the world in the value of its international commodities trade and fourth in the size of its merchant fleet. As the largest developing country, China attached importance to harmonization of the law on the carriage of goods by sea, but its own fundamental national interest forced it to reject such high limits of liability.

65. **Mr.** Ibrahima Khalil **Diallo** (Senegal) asked China to take account of the will of the Commission. While China's needs were understandable, the rest of the world needed China, and it should try to reach an accommodation.

66. **Mr. Egbadon** (Nigeria) said that he understood the difficulty faced by China, the major trading partner of several African countries, but political considerations were also important, and he asked the Chinese delegation to reconsider before taking a final position.

67. **The Chairperson** said that it was clear that there was very broad support in the Commission for the current text of draft article 61.

68. *Draft article 61 was approved in substance and referred to the drafting group.*

Draft article 62 (Limits of liability for loss caused by delay)

69. **Mr. Oyarzábal** (Observer for Argentina) noted that the text set a limit of liability for economic loss due to delay equivalent to two and one-half times the

freight payable on the goods delayed, but since delay might damage the goods, that limit was not reasonable.

70. **Mr. Mbiah** (Observer for Ghana) said that he recalled that in earlier versions the Commission had done away with limits based on freight payable.

71. **Mr. Miller** (United States of America) clarified that the limit of liability based on freight payable did not relate to physical loss or damage to the goods due to delay, where the general limits in draft article 61 would apply, but only to non-physical, economic or consequential loss.

72. *Draft article 62 was approved in substance and referred to the drafting group.*

The meeting rose at 6 p.m.